NO. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

EARL H. McDONALD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOSEPH F. WASHINGTON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE PETITIONERS.

CHARLES E. FORD,
Columbian Building,
Washington 1, D. C.

JOHN LEWIS SMITH, JR.,
729 15th St., N.W.,
Washington 5, D. C.
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE OPINIONS BELOW.

The majority and minority opinions of the United States Court of Appeals for the District of Columbia (R. 28-31) are reported at 166 F. 2d 957.

JURISDICTION.

The judgment of the Court of Appeals was entered February 16, 1948 (R. 32). The petition for writs of certiorari was filed March 16, 1948, and on April 19, 1948, this Court granted the petition. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also, Rules 37(b) and 45(a), Federal Rules of Criminal Procedure.

SPECIFICATIONS OF ERROR.

The Court erred in denying petitioners' motions to suppress the evidence seized, petitioners having been subjected to unreasonable search and seizure in violation of the Fourth and Fifth Amendments to the Constitution because:

(1) The police officers did not have a warrant of arrest for any one in the premises.

(2) The police officers did not have a search warrant for the premises.

(3) The police officers did not have probable cause to believe a felony was being committed, application for a warrant having been denied several times by the United States Commissioner.

(4) The police officers forcibly entered the premises, without permission, and are guilty of a lawless violation of private property.

(5) Roomers in a private dwelling house are protected by the constitutional prohibition against unreasonable searches and seizures.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED.

The constitutional and other provisions involved are set out in the Appendix, page 10, *infra*.

QUESTIONS PRESENTED.

Whether the action of police officers, after having applied several times to the United States Commissioner for a warrant and having been refused, in breaking into a private dwelling by climbing through a window without permission, proceeding on a general exploratory search of the premises without a warrant of any kind, and climbing on a chair in the second floor corridor to peer over a transom into a tenant's locked room constitutes an unreasonable search and seizure. Whether a roomer as well as a landlord has constitutional rights under these circumstances protected by the 4th and 5th Amendments.

STATEMENT OF THE CASE.

This case presents for correction errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia.

About 3:30 P.M. on June 22, 1946, police officers Ogle, Blick and Clarke went to premises 1608 3rd St., N.W., Washington, D. C., a brick residence in a row of houses containing a basement, first floor and second floor. This residence was owned by Mrs. Barbara Terry, who occupied part of the first floor and rented rooms. At the time of this occurrence Mrs. Terry had several tenants, one of whom was the petitioner McDonald who rented a room on the second floor. (R. 11, 13)

The police officers were not responding to an emergency call and did not have a warrant of any kind for anyone in the premises. They had neither a search warrant for the premises nor a warrant of arrest for either of the appellants. (R. 18) The police officers had applied to the United States Commissioner on several occasions but had never obtained a warrant. (R. 24)

The door to the residence is usually locked and was locked on June 22, 1946. Without the permission of Mrs. Terry,

Detective Sergeant Ogle raised the window leading into her bedroom and climbed in through the window. (R. 17) Mrs. Terry screamed and Sergeant Ogle brushed her aside. He went to the front door, unlocked it and admitted Lieutenant Blick. Sergeant Ogle then went to the back door, unlocked the screen door and admitted Detective Sergeant Clarke. (R. 12)

The police officers then searched the rooms on the first floor and went up to the second floor. They searched the bedrooms and closets on the second floor. Noticing the rear room on the second floor was locked, Sergeant Ogle took a chair from the middle bedroom and looked over the transom. (R. 13) He then directed the occupant to open the door and petitioner McDonald complied with his instructions. Petitioners McDonald and Washington who were in the room were placed under arrest and certain property was seized by the officers. (R. 14) Mrs. Terry objected to the method in which the police officers entered her home without permission and without ringing the bell. (R. 15)

Petitioners were indicted September 6, 1946 on four counts involving one transaction for promoting a lottery, possessing lottery tickets and keeping a place and a table for wagering on horse races. (R. 3-4) A motion for the return of seized property and the suppression of evidence was filed on September 11, 1946 and denied by District Court on October 16, 1946. (R. 6-8)

On November 13, 1946, when the case came on for hearing, petitioners waived trial by jury and elected to be tried by the court. The motion for the return of seized property and the suppression of evidence was re-argued On January 20, 1947 the District Court denied the motion and found the petitioners guilty on all four counts. (R. 10) On March 28, 1947 petitioner McDonald was sentenced to imprisonment for a period of six months to eighteen months and petitioner Washington was sentenced to imprisonment for a term of sixty days, after which an appeal was instituted. (R. 10-11)

ARGUMENT.

I.

The Search of the House Was Unreasonable and Therefore Illegal.

In *Carroll* v. *United States*, 267 U.S. 132, this Court said:

> " * * * Guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between the search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motorboat, wagon or automobile for contraband goods where it is not practicable to secure a warrant * * * because the vehicle can be quickly moved * * * ."

In the present case, the police officers did not have a warrant of arrest nor a search warrant. The house was a dwelling. It has been consistently held that search of a dwelling without a warrant is never reasonable except as an incident to a lawful arrest. (*Weeks* v. *United States*, 232 U.S. 383; *Agnello* v. *United States*, 269 U.S. 20; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344). Search of this house was not incidental to any arrest, either lawful or unlawful. The officers had no right to, and did not, break into the house in order to arrest McDonald. It does not even appear that they knew he was present. The officers broke and entered the house in order to make the illegal search, which instead of being incidental to the arrests led to the arrests.

Exploratory or general searches, not incidental to a lawful arrest, and not based on probable cause, violate the prohibition of the Fourth Amendment, and evidence seized as the result of such searches will be suppressed. (*Boyd* v. *United States*, 116 U.S. 616; *Weeks* v. *United States*, *supra*; *Marron* v. *United States*, 275 U.S. 192). Having forcibly invaded the house by opening and climbing through a win-

dow, the officers proceeded on a general exploratory search of the entire premises, finally standing on a chair in the second floor corridor and peering over the transom of a locked room. (R. 13) Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and "a search prosecuted in violation of the Constitution is not made lawful by what it brings to light."[1] (*Weeks* v. *United States*, *supra*; *Go-Bart Importing Co.* v. *United States*, *supra*; *Taylor* v. *United States*, 286 U.S. 1).

Necessarily the government must take its stand upon the proposition that the officers here possessed sufficient probable cause. The record shows that the officers had applied to the United States Commissioner on several occasions but had failed to secure a warrant of any kind. (R. 24) In *Johnson* v. *United States*, 92 L. Ed. 323, 325, decided February 2, 1948, this Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably

[1] *Boyd* v. *United States*, 272 U. S. 28.

> yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Having failed to obtain a warrant from the properly constituted authorities, the police officers in the present case took matters into their own hands and proceeded to make the search without such warrant. It is submitted that officers claiming access to private living quarters must have some valid basis in law for the intrusion. "Any other rule would undermine the right of the people to be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law."[2]

II.

Roomers in a Private Dwelling House Are Protected by the Constitutional Prohibition Against Unreasonable Searches and Seizures.

The majority opinion of the Court of Appeals for the District of Columbia is in conflict with the decisions of this Court and the various Circuit Courts of Appeal. In the present case, petitioner McDonald was a tenant in the premises searched and owned the property seized. He was of course entitled to use the corridor, and it is submitted that illegal search of the room and illegal invasion of the corridor was a plain violation of his constitutional right.

In treating a similar situation, the 3rd Circuit Court of Appeals said in *Brown, et al.* v. *United States*, 83 F. (2d) 383:

> "The house was a private dwelling in which the proprietress with her family lived. She also kept roomers. It was not a hotel, restaurant, or public place where the public was invited or had the right to come

[2] *Johnson* v. *United States*, *supra*.

and go at will. Into this home the officers of the government practically forced themselves without the semblance of authority, for they did not see any crime being committed and did not even have probable cause sufficient to justify the issuance of a search warrant, or probable cause to believe that Lillian Brown had committed a felony. The existence of probable cause does not justify the search of a private dwelling without a search warrant. Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Agnello v. U. S., 269 U.S. 20, 32, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A.L.R. 409; United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A.L.R. 775 . . .

"Carinelli and Neubert were roomers in the house. It was their home and so far as the unlawful search affected them, it violated their constitutional rights.

"The entrance into the house was unlawful and the officers were trespassers. As such, they had no right to make an exploratory search of every room in the house from cellar to attic, ransacking every closet, dresser drawer, or piece of clothing, obtaining the key to some of the doors of the garage by threats and breaking down others. Any evidence obtained during and by means of such search may not be used against the defendants."

Compare also *Waxman* v. *United States*, 12 F. (2d) 775 (C.C.A. 9th), cert. denied, 273 U.S. 746; *Coon* v. *United States*, 36 F. (2d) 164 (C.C.A. 10th).

The dissenting opinion of the Court of Appeals in the present case reads in part as follows (R. 31):

"The question is not whether officers may look in an unconventional way into another place, from a place in which they have a right to be and in which the person who complains has no interest. The question is whether officers may look into a room from a place in which they have no right to be and in which the person who complains does have an interest; the corridor that is the only means of access to his room. A roomer's constitutional right of privacy is a fiction that keeps the word of promise to the ear and breaks it to the hope unless it includes a right not to be spied upon by

trespassers who force their way into his corridor. Yet the government contends that search by such trespassers is reasonable and the court decides that it is not a search.' Neither of these propositions is comprehensible to me. No doubt a roomer's interest in a corridor is different from a householder's. Probably the one may be called an easement and the other an estate, as the government suggests. But I know of no reason why this difference should be critical here.' To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society."

It is submitted that this minority opinion is in accord with established principles of law and that the government's attempt to whittle away the protection afforded citizens under the Fourth and Fifth Amendments should not be sanctioned.

CONCLUSION.

Wherefore, it is respectfully submitted that the Court of Appeals for the District of Columbia committed error in affirming the judgments of conviction and that the judgments should be reversed.

Respectfully submitted,

Charles E. Ford,
Columbian Building,
Washington 1, D. C.

John Lewis Smith, Jr.,
729 15th St., N.W.,
Washington 5, D. C.
Attorneys for Petitioners.

APPENDIX.

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Federal Constitution provides:

"No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Title 22, Sec. 1501.—District of Columbia Code (1940 Edition) Lotteries—Promotion—Sale or possession of tickets.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle

bim to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, Sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 1.)

Title 22, Sec. 1502.—District of Columbia Code (1940 Edition) Possession of lottery or policy tickets.

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 2.)

Title 22, Sec. 1504.—District of Columbia Code (1940 Edition) Gaming—Setting up gaming table—Inducing play.

Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for

the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaining table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, Sec. 865)